

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MOTION HEARING

UNITED STATES MAGISTRATE

APPEARANCES:

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1 P R O C E E D I N G S

2 MR. SMITH: The next case is 4:08cr224 United
3 States of America vs. David Vogel. For the Government?

4 MR. COLLINS: Kevin Collins, Your Honor, and the
5 Government is ready to proceed.

6 THE COURT: Okay. Mr. Collins. And for the
7 defendant?

8 MR. SMITH: Your Honor, Scott Smith here for the
9 defendant.

10 THE COURT: Okay. We have two matters, why don't
11 we go ahead and take up first the defendant's motion for
12 appointment of co-counsel. I would like to hear you on
13 that, Mr. Smith.

14 MR. SMITH: Your Honor, I honestly think that if
15 the first motion is granted that we filed, that moots out
16 this motion. If you grant a release of certain funds,
17 there will be no need to hire co-counsel because
18 Mr. Vogel would then have the ability to hire his own
19 counsel. I can speak to the motion though, if you would
20 like.

21 THE COURT: I understand, but I would still like
22 to hear from you all on that, and we'll proceed then on
23 the second motion.

24 MR. SMITH: Certainly, Your Honor.

25 As you are aware, and I know this Court has gone

1 through numerous motions as has Judge Crone, and you're
2 very aware of the depth and complexity of these
3 proceedings. We have, as you well know, a million or so
4 pages of discovery. And the organizational scheme that
5 we're getting it is not the best. It's -- it's
6 haphazard, it's in various different places, it's -- most
7 of it is electronic and cumbersome to handle. And I,
8 being a solo practitioner with a fairly active practice
9 before I was assigned this case, I'm finding it very
10 difficult to plod through all of the information and make
11 the appropriate motions, make the appropriate acquisition
12 of expert assistance and the like, and believe that the
13 assistance of co-counsel in this particular case is very
14 necessary for me to provide effective assistance of
15 counsel to Mr. Vogel.

16 Mr. Vogel has asked that I find someone who can
17 give exclusive attention to this case. I don't know of
18 anybody on the CJA panel who is able to do that, but I do
19 believe it's very necessary for co-counsel to be
20 appointed for us to proceed in an effective matter and
21 present an effective defense for Mr. Vogel.

22 THE COURT: I understand. Mr. Collins, the
23 Government -- I know the Government has indicated they
24 are opposed.

25 MR. COLLINS: Yes, Your Honor, we're opposed

1 factually to two things that Mr. Smith just said, and
2 then I have a general comment with respect to how the
3 Court may wish to move forward.

4 With respect to Mr. Smith's comments about the
5 million pages of discovery, although it is true that the
6 volume of pages likely reaches a million pages, it's
7 really just a smaller subset of pages that's relevant
8 here, and it's not necessary for either the Government or
9 the defense to -- to pour through all million of those
10 pages. Certainly we've made those available under Rule
11 16 and they are welcome to do so, but it's probably not
12 the most effective use of Mr. Smith's time.

13 And with respect to his inability to file motions
14 because of discovery problems or any other issues that
15 may arise, we are here on two motions today that
16 Mr. Smith has filed. And certainly from the Government's
17 perspective the defendant has had the ability to file a
18 number of motions which we have had to respond to. So I
19 just wanted to be clear on those two points.

20 In terms of our opposition, if -- if the Court
21 feels it's necessary that Mr. Vogel requires a second
22 counsel, we certainly don't want to stand in objection to
23 that. But we -- we are mindful of the fact that there's
24 more than one defendant in this case and we're concerned
25 that if the Court were to grant counsel for Mr. Vogel,

1 that we would immediately get three -- three additional
2 motions from the three codefendants and we would be here
3 again, and all of a sudden we would be dealing with eight
4 defense counsel versus the four that we're currently
5 dealing with. So if the Court is inclined to add another
6 lawyer to the defense team for Mr. Vogel, perhaps there's
7 a way to craft an order that makes that lawyer's work
8 available to the co-counsel on the defense team. Of
9 course, I'm not privy to any joint defense agreements
10 that they may have developed, but if we could have that
11 individual who may be appointed use his or her resources
12 for the other members -- the other defendants, that might
13 make it a little bit easier.

14 And the only other thing the Government would ask,
15 Your Honor, is that we would appoint Mr. Smith as lead
16 counsel on the case so that any notifications, any
17 conferences that we're required to do under the rules, as
18 long as we spoke to Mr. Smith that would be sufficient
19 and we wouldn't have other attorneys coming in and saying
20 that we hadn't been notified of, you know, some
21 obligation.

22 THE COURT: I assume Mr. Smith has no objection to
23 that part of it?

24 MR. SMITH: I'm sorry, I was thinking ahead. What
25 was the last statement?

1 THE COURT: I think they want to make sure you're
2 the lead counsel. If the Court deemed it necessary to
3 appoint additional counsel, that you're deemed as the
4 lead counsel.

5 MR. SMITH: I assumed that would be the case.

6 THE COURT: Okay. Any response, Mr. Smith?

7 MR. SMITH: Of course. First of all, you look
8 over at this table, there's three U.S. Attorneys sitting
9 there, there's at least two others that have appeared of
10 record, they've got half their office in Sherman I
11 suspect working on this. They've also had several
12 agents -- and I cited this in my motion -- who worked six
13 months as a team to develop information on this case.
14 That's six agents full-time working on this case. And
15 while there may be a million documents, I think it's
16 disingenuous to suggest we shouldn't be looking at all of
17 them. I can't do my client service like that. If they
18 are irrelevant, they should be set aside and designated
19 as irrelevant, they won't use them. If there are eight
20 defense counsel, that's what it's going to take, and
21 that's just too bad. This is a complex case and it's
22 just too much for one solo practitioner to do on his own.

23 THE COURT: Okay. Thank you. I will take that
24 motion under advisement.

25 Let's move on to the motion to -- for release and

1 exemption to pay attorney's -- attorney's fees.

2 MR. COLLINS: Your Honor, before we move on to the
3 second motion, the Government would like to clarify the
4 number of counsel assigned to this case. Although at
5 times different names have appeared on the -- on the
6 Pacer list, one of those names is the criminal chief and
7 he's notified of major cases in the district and that's
8 why his name appears. He's not providing any substantive
9 help on this case. Another name, Ms. Reno, Ms. Tammy
10 Reno, she's actually left the district and is currently
11 serving administrative detail up in Washington D.C. and
12 no longer has any impact on the case. A minor
13 clarification, but we just wanted to get that on the
14 record.

15 THE COURT: I understand. Okay. Let's go on to
16 the next motion. Before we present any kind of evidence
17 I would like to hear some argument about how you think we
18 should proceed in this matter. And since Mr. Smith, this
19 is your motion --

20 MR. SMITH: Certainly, Your Honor.

21 I think the first question we have to ask is, is
22 Mr. Vogel entitled to a hearing. And from reading the
23 motions and responses and replies, I think everybody
24 seems to be in agreement that the Jones test from the
25 Tenth Circuit seems to be the test that should be applied

1 here. It's been referred to by the Fifth Circuit in a
2 couple of cases we both cite, and I think that's the test
3 that we look at. And if that is in fact the correct
4 test, we must do two things -- we, being Mr. Vogel.

5 First, he must demonstrate that he has no assets
6 other than those restrained, with which to retain private
7 counsel. Second thing, he needs to make a prima facie
8 showing of a bonafide reason to believe that the grand
9 jury made a mistake in determining that the restrained
10 assets are derived from gross proceeds from the offense.
11 Now importantly what the Tenth Circuit case says, and of
12 course it's been followed by Fifth Circuit authority, is
13 that Mr. Vogel as the defendant merely has to produce
14 information suggesting this. He doesn't have the burden
15 to prove it, he just has the burden to produce
16 information. And the reason for that is it's sort of a
17 gatekeeping function to keep frivolous cases from coming
18 into the system. Once he meets that threshold burden to
19 produce, the Government then has the burden to prove or
20 establish -- prove the Government to establish probable
21 cause to believe that the assets are traceable to the
22 underlying offense.

23 And finally, the thing that I think is important
24 to know is that the Court is not constrained by the rules
25 of evidence. They are looser rules, you can allow things

1 to come in for these purposes. And I think that's the
2 framework for which we're working, as established by the
3 Jones case that both parties cited. And with that, I
4 think that's the conclusion of my opening statement is
5 about what -- how we got here today.

6 THE COURT: Mr. Collins?

7 MR. COLLINS: Your Honor, the Government agrees
8 that that's the framework upon which the Court should
9 proceed today. The defendant has the burden to prove
10 that he doesn't have any additional non-restrained funds
11 to meet his defense, or actually to cover any reasonable
12 living expenses in the ordinary course of his -- of
13 living. And he also has to prove that there's at least
14 some evidence that the grand jury made an erroneous
15 finding of probable cause with respect to the intent
16 to -- for criminal forfeiture in the -- in the two
17 indictments.

18 The only other issue that should be considered
19 while we're discussing these points is the fact that
20 Mr. Vogel does in fact have at least one counsel, and
21 possibly after today two counsel. And there are -- there
22 is case law in the Supreme Court that states that you're
23 not entitled to the attorney of your choice, you're just
24 entitled to effective assistance of counsel. And
25 certainly that should be considered as we're listening to

1 these arguments that -- that he -- there can't be made an
2 argument that he needs to tap into restrained funds so
3 that he can -- you know, so he can pay for the service of
4 the attorney of his choice.

5 THE COURT: But isn't that true in the case where
6 the Government has seized the defendant's money? Does
7 that same -- in terms of the way the Supreme Court looks
8 at that issue, whether or not -- I mean yes, you have a
9 right to hire counsel if you can afford it, otherwise all
10 you're entitled to is effective assistance of counsel,
11 but does that also apply in a situation where the
12 Government has seized all the defendant's money, which in
13 this case if the money wasn't seized he would have used
14 that to pay for counsel.

15 MR. COLLINS: Yes, it -- it applies to the
16 unrestrained funds. In this -- in this instance we
17 believe there's sufficient probable cause to demonstrate
18 that these are in fact restrained funds that flowed from
19 illegal activities.

20 THE COURT: And let me ask both counsel, in my
21 looking at the cases it doesn't seem like the Fifth
22 Circuit has yet decided -- I know you both cited Jones --
23 the Fifth Circuit hasn't set out or adopted that that's
24 the frame work. Look, I understand that's what both of
25 you say, we should proceed on --

1 MR. SMITH: It's not been specifically adopted.

2 THE COURT: Because I know the Fifth Circuit, the
3 way they kind of approached it, was they didn't -- and
4 this may be kind of in a footnote where they didn't --
5 they just basically say we're not sure what the standard
6 should be on whether or not to have the probable cause
7 hearing is the way I read the cases. And I just wanted
8 to see -- I didn't see a Fifth Circuit case that
9 basically said we're adopting this Jones framework and
10 this is how you should proceed.

11 MR. SMITH: No, I don't think there is one. I
12 think they cite with approval Jones, the cases that
13 follow it, and that's implicitly I think why we're both
14 using that framework.

15 MR. COLLINS: Your Honor, probably the closest
16 that the First Circuit gets is United States vs. Holyland
17 Foundation For Relief and Development. I brought a
18 courtesy copy if the Court needs it.

19 THE COURT: I have it here. No, that's fine. I
20 just wanted to make sure we're all on the same page in
21 terms of where -- of the -- the current state of the
22 Fifth Circuit law.

23 MR. SMITH: Judge, I don't know if you read the
24 Progenee (sic) case that I cited, it wasn't published, it
25 was a district court opinion out of Louisiana. And

1 curiously arising out of the same sort of facts, and it
2 basically applied the Jones factors.

3 THE COURT: I understand. Well, Mr. Smith, I
4 guess we start off with you.

5 MR. SMITH: Your Honor, I think our burden to
6 produce is met if we offer Exhibits Number 1 through 10,
7 and then I can simply explain how those meet our burden.

8 THE COURT: Have you provided a copy of the
9 exhibits to the Government?

10 MR. SMITH: I gave them to them shortly before the
11 hearing.

12 THE COURT: Any objection to these exhibits?

13 MR. COLLINS: No, Your Honor.

14 THE COURT: I'll admit these exhibits.

15 Go ahead and explain to me, since I'm being
16 tendered these exhibits at this present moment --

17 MR. SMITH: I understand.

18 THE COURT: So tell me how this meets your burden.

19 MR. SMITH: Your Honor, the first burden is the
20 burden of indigency. And I think that's been answered
21 for some time now in this case. As you recall, we had
22 numerous hearings and you eventually made a determination
23 that he could proceed in forma pauperis, which is a
24 finding under the CJA Act that he does not have the
25 ability to hire counsel. That's Exhibit 1, which is the

1 order that you entered in this case making that
2 determination.

3 If you look at Exhibit 2, which is a declaration
4 Mr. Vogel filed in the civil proceedings, at paragraphs
5 15 and 16 he describes how the seizures of these funds
6 have left him without the ability to support himself,
7 which of course is not the issue today, and more
8 importantly number 16, I'll be able to find any legal
9 defense to the actions taken by the Government. I think
10 that adequately establishes our burden that he is in fact
11 indigent, and I'll move on to my discussion of burden of
12 producing that the assets are not tied to this offense.

13 And probably the easiest way to look at this is
14 look at Exhibit 4. It's a summary. And Mr. Vogel had
15 purchased at one time in -- excuse me -- in 2004, a
16 condominium in Trump Towers. And we've got attached
17 hereto as Exhibit 5 the title policy which establishes
18 his purchase price was \$2.2 million. That was in fact
19 sold about three -- just under three years later for a
20 profit of about a million 725 -- excuse me, a million
21 five. And we've got the various exhibits, 7, 8, and the
22 various declarations of Mr. Vogel and an attorney that
23 established those funds went from one account to the
24 other and finally were seized by the Government in the
25 amount of 3.7 and some change. Basically establishing

1 that the value of the condominium grew by \$1.5 million
2 and that growth has absolutely nothing to do with any
3 sort of illegal activity, that's just a virtue of market
4 gaining.

5 THE COURT: When is it alleged that the
6 allegations in the indictment took place?

7 MR. SMITH: 2000 to 2007 is the framework of the
8 time they establish -- or they allege for the conspiracy.

9 THE COURT: And how are we establishing that the
10 acquisition in November of 2004 isn't tied to anything
11 here?

12 MR. SMITH: That's the Government's burden to
13 prove that. I mean, let's assume that it is. The growth
14 is not something that's tied to any sort of illegal
15 activity, that was simply the growth that happened
16 through the passage of time, and while it was owned by
17 Mr. Vogel. That's an absolute -- has nothing to do with
18 Madison Pain Clinic.

19 THE COURT: Well how do you separate that,
20 Counsel, if the actual asset that was purchased was --
21 was some -- some proceeds from the alleged illegal
22 activities went into the purchase of the \$2.2 million
23 property? How would the Court ever -- how would you ever
24 separate that even if --

25 MR. SMITH: Just precisely the way we're doing it.

1 THE COURT: No, I understand, but --

2 MR. SMITH: 2.2 originally. If the Government
3 claims that's still tainted money, they are entitled to
4 seize that if they can prove it. But the growth has
5 nothing to do with that. And that's -- and you do it by
6 tracing, exactly what we've done here. You show -- you
7 do it like you do if you sold an asset on an income tax
8 return, you have a basis, you have a sale, and then the
9 difference is the -- is the gain. And our point is the
10 gain is not attributable to the Madison Pain Clinic. And
11 that's easily traced by the documents that we've offered
12 to produce, or have produced here before the Court.

13 The last document is Exhibit Number 10, which is
14 the --

15 THE COURT: Do you have any -- do you have any
16 case law indicating that gains from properties if it's
17 tied to illegal activities, that the defendant gets to
18 parse out gains?

19 MR. SMITH: One second.

20 (Pause)

21 MR. SMITH: Your Honor, I don't have a case in
22 front of me, but -- but in the commingling sense, if
23 funds are commingled and you can trace them back out,
24 they are not seizable.

25 THE COURT: Yes, but this is not a commingle

1 issue. The issue is, is that the asset -- and I'm just
2 thinking if that -- if that original asset has some ties
3 to the criminal activity and if that asset could have
4 been properly seized, I'm not sure -- my question is,
5 it's not -- is it a commingling, or is that just the
6 assets increased in value, but --

7 MR. SMITH: I think the increase is something that
8 should be released to Mr. Vogel. We might be in a
9 different discussion if it hadn't ever sold and we were
10 talking about, you know, vague difference -- you know,
11 what could it sell for. But we know what it sold for and
12 we know exactly what the number is. So we are able to
13 trace it back to this 1.56 million dollars.

14 THE COURT: Okay. Go ahead and proceed,
15 Mr. Smith.

16 MR. SMITH: The last point is that the Chase
17 account was a -- which is Exhibit Number 10, was an
18 account that was maintained by Mr. Vogel. We've produced
19 the statement, he's got his declaration which says that
20 this was basically largely funded through a margin
21 account funds, loans, and therefore I think that produces
22 or meets our obligation of production that the Government
23 would then have to rebut through testimony.

24 THE COURT: Okay. Now explain -- just walk me
25 through it to make sure I understand. The money, 3.7

1 went into -- where did it -- it went into the First
2 Republic account?

3 MR. SMITH: Back to Exhibit 4, is that where you
4 are, Your Honor?

5 THE COURT: Exhibit 4, yes.

6 MR. SMITH: That's the summary, and that sort of
7 traces it and tags it to the various exhibits. The money
8 initially went into First Republic account 6959, in two
9 different segments. One chunk came from the title
10 company, and one chunk came from an attorney's office.
11 It was then transferred into, within three weeks, the
12 second First Republic account 3755. And we've got those
13 account statements to show that. Then the Government
14 seized it out of 3755 and the only thing that was in that
15 account was the money that was tied to the sale of the
16 condominium, and that's established through the
17 declaration of Mr. Vogel. So we have been able to trace
18 it to the penny.

19 THE COURT: Okay. Mr. Collins, response as to
20 this?

21 MR. COLLINS: Yes, Your Honor, I'll take -- I'll
22 take the items up in the order in which they were
23 presented.

24 First, Mr. Smith relied upon Exhibit 1 to
25 demonstrate that Mr. Vogel was indigent. A couple of

1 points on that, Your Honor.

2 First of all, the Court knows that at least is
3 aware of his financial affidavit which was submitted in
4 camera. Obviously, the Government does not have access
5 to that document. But in addition to whatever may -- may
6 be on that document with respect to his assets, it's also
7 been clear through various proceedings in this court that
8 Mr. Vogel has a \$400,000 house in New Hampshire. He's
9 represented to the Court that that's held in trust, but
10 he -- he is in fact a trustee of that house and could
11 have the power to take a lien out against that house or
12 liquidate that house in an effort to cover some of his
13 legal expenses. In addition to that, Mr. Vogel still may
14 be in possession of a coin collection. I -- the
15 Government is unclear whether or not he has ever
16 surrendered that coin collection into the Court's
17 registry. But at various times throughout all the
18 proceedings in this -- in this matter he's represented
19 the value of that coin collection to range from \$10,000
20 to \$100,000. Again, that's a -- that's a significant
21 asset that might be used to provide for his defense. So
22 I think as the Court considers the -- whether or not
23 Mr. Vogel is indigent, the Government would ask that the
24 Court also consider this \$400,000 house in New Hampshire
25 and the status of his coin collection.

1 With respect to the tainted assets, and sort of
2 this novel approach of tracing the assets, Mr. Smith says
3 in this instance we have a nice clear trace because
4 the -- the asset was sold. It's novel, but it -- it goes
5 against the spirit of asset forfeiture, and certainly
6 likely against the case law. This is a new argument and
7 certainly the Government does not have a case to present
8 to the Court today, but the -- the policy behind asset
9 forfeiture is not to allow criminals to make off with the
10 proceeds of their illegal acts. It strikes the
11 Government as patently unfair that Mr. Vogel could say
12 that, well, I may have bought the house with tainted
13 funds but -- I may have bought any asset with tainted
14 funds, in this instance an apartment, but that asset
15 accrued in value or increased in value so I should get
16 the benefit of that. You can take the first two million,
17 but I'm going to keep that 1.2. That just -- that just
18 strikes me as patently opposite of what the criminal
19 forfeiture laws would provide for.

20 And -- and finally -- well, that's just it, Your
21 Honor.

22 THE COURT: Are you aware of any cases regarding
23 this issue of -- the argument the defendant is asserting
24 is, is that because the asset was sold, it's not really a
25 commingled asset and you can separate the asset that may

1 be tied to criminal activity and the actual gain that was
2 made.

3 MR. COLLINS: Your Honor, like -- like I said a
4 moment ago, I haven't researched this point. I'm happy
5 to do so and respond in writing to the Court. So I'm not
6 familiar today on any particular case that would address
7 that issue. But again, criminals aren't allowed to
8 invest their proceeds of criminal activity into legal --
9 into legal means and then get to recoup the legal return
10 on their criminal activity. Once -- once the dollars
11 that go into the pot are tainted, what comes out of the
12 pot is also tainted and -- and we -- we often focus on
13 the drug conspiracy issue in this case, but let's not
14 forget there's a money laundering count here, as well.
15 And so this sort of begins to support the idea that
16 perhaps he was using illegal proceeds and investing in
17 assets, and then trying to wash that money out so that he
18 could -- he could have clean -- clean claim to that -- to
19 that income.

20 THE COURT: Thank you, Mr. Collins.

21 Mr. Smith, do you want to respond?

22 MR. SMITH: Yeah, I do, Your Honor, because we're
23 not sentencing this man. This is not the end of the
24 line, this is before he has ever had his trial. And he's
25 simply asking for enough money be released from this

1 because he's established it's not connected to the -- the
2 alleged offense.

3 THE COURT: Right. But Mr. Smith, we do have --
4 the grand jury found a probable cause finding.

5 MR. SMITH: Without an adversarial hearing, Your
6 Honor.

7 THE COURT: I understand.

8 MR. SMITH: This is the first chance we have had.

9 THE COURT: I understand. But it's not like --

10 MR. SMITH: We're not asking that the \$1.5 million
11 be given to Mr. Vogel. We're asking that you release so
12 much as is necessary for him to retain the counsel of his
13 choosing. That's all we're doing. And you talk about
14 fairness in terms of the forfeiture laws, if the
15 Government gets back 2.2 that they can trace to the
16 initial offense, that's what they are entitled to.
17 They're not entitled to a windfall.

18 THE COURT: Any other response, Mr. Smith?

19 MR. SMITH: Any other?

20 THE COURT: Anything else you want to say in
21 response to the Government's --

22 MR. SMITH: Yeah, in response to the indigency
23 issue, I think that's res judicata in this case. You
24 determined it, they didn't challenge it, I think that's a
25 determination he is indigent.

1 THE COURT: Okay. Well I think what I'm going to
2 do is -- we're going to go ahead and proceed on to -- I'm
3 going to take this issue under advisement. I still
4 want -- I do want some -- I will allow you an additional
5 week to brief this issue of this idea of commingling.
6 I'm just not aware of any -- this is a unique issue I
7 have not seen before, so I will give y'all the
8 opportunity to see whether or not something -- I guess a
9 week from today if you give me additional information on
10 that. But in the meantime, I think we're going to go
11 ahead and proceed.

12 Are you ready to proceed --

13 MR. COLLINS: Yes, Your Honor.

14 THE COURT: -- with the probable cause hearing?

15 MR. COLLINS: Yes, Your Honor.

16 THE COURT: Okay. Mr. Collins, who is your first
17 witness?

18 MR. COLLINS: Can I have a minute, Your Honor?

19 THE COURT: Yes.

20 (Pause)

21 MR. COLLINS: Your Honor, it's -- it's the
22 Government's position that the Government is -- is not
23 required to put on witnesses with respect to probable
24 cause. That -- the case law is not clear on this point,
25 but one way to approach this is that the defendant has to

1 disprove that there was probable cause. The Government
2 is going to stand on the fact that two grand juries
3 reached a probable cause conclusion supporting the
4 indictments. Both indictments included criminal
5 forfeiture provisions.

6 THE COURT: Mr. Collins, though, the difference
7 between this case and the finding by probable cause by
8 the grand jury, it wasn't an adversarial proceeding. So
9 tell me if I'm wrong, but I thought that an adversarial
10 proceeding requires the Government to go ahead and
11 establish the probable cause with the opportunity for the
12 defense to question that and present their own witnesses,
13 too.

14 MR. COLLINS: Well, Your Honor, that -- that may
15 be true, but under United States vs. Holyland, which is
16 the Fifth Circuit decision, footnote 17 --

17 THE COURT: Let me find it here. There's not a
18 footnote 17.

19 MR. COLLINS: I'm sorry, Your Honor it's --
20 it's -- I apologize. It's on the bottom of page 507.

21 THE COURT: Yeah, I see it. Okay. So basically
22 what that's saying -- tell me if I'm wrong again -- the
23 way I read that footnote, is that it requires the Court
24 to make the first initial determination before we can go
25 on to have a probable cause hearing. But once -- if

1 defendant meets their burden, then I think it allows us
2 to proceed in the way I was going to proceed. Is that
3 the way you read that?

4 MR. COLLINS: That's the way I read it, Your
5 Honor, but it is with respect to whether or not there's
6 some erroneous conclusion with respect to the grand
7 jury's decision that there was probable cause. And at
8 this point we haven't addressed that issue.

9 THE COURT: Well the only thing that's been
10 addressed is -- the only argument they are making
11 regarding that is this idea -- Mr. Smith, tell me if I'm
12 wrong -- is we're back to the question of whether or not
13 the 1.5 gain, if that's considered untainted as a matter
14 of law is really what you're -- that's the basis you're
15 here before us. You're not -- because you've not
16 presented any evidence to the Court trying to establish
17 that the original asset that was seized --

18 MR. SMITH: And under Jones and Progenee (sic)
19 we're not required to. We're required to produce
20 information leading -- leading to question about the
21 viability of the grand jury's findings.

22 THE COURT: Right. But the only question you're
23 raising is the question regarding the gain. That's the
24 only thing that -- that's the only thing you're
25 establishing here because the grand jury established

1 probable cause in seizing the overall assets. So the
2 only thing I'm hearing from you is the question of
3 whether or not the \$1.5 million gain is allowed to be
4 separated.

5 MR. SMITH: Then perhaps you've overlooked one
6 thing, and that is -- that is the easiest one to argue,
7 that's why I focussed on that. But there's also Exhibit
8 10, which is a separate account, which was a \$500,000
9 investment account maintained by Mr. Vogel. Which was --
10 when it was liquidated by -- at the behest of the
11 Government, only yielded 332,000. But we contend that as
12 well is an untainted asset.

13 THE COURT: Okay. But how is it untainted? I
14 mean just you're making that assertion is not sufficient.

15 MR. SMITH: Well, it's also contained in Exhibit
16 Number 1 -- or excuse me, 2, which is Mr. Vogel's
17 declaration that that account was acquired in much part,
18 most part, some part at least by leverage margin account
19 loans, which would have nothing to do with Madison Pain
20 Clinic.

21 THE COURT: Okay. Let's make sure we separate
22 these issues. First, as to the Chase account and the
23 1.5 million --

24 MR. SMITH: That's the Republic account.

25 THE COURT: Right. That's the Republic account?

1 MR. SMITH: Yes, sir.

2 THE COURT: The argument there is only the 1.5
3 gain.

4 MR. SMITH: That's all we've produced.

5 THE COURT: Correct. Okay. So now let's go
6 back -- so Exhibit 10 is the Chase account and it was --
7 I guess -- was the total amount seized 330 --

8 MR. SMITH: It's 330,000 and some change. And
9 I'll be honest with you, Your Honor, if we get through
10 the first one with the million five, that's obviously
11 going to be more than enough to cover the release for
12 attorneys fees that we're requesting.

13 THE COURT: I understand, but we're here on this
14 first question and so I want to make sure we've
15 established it on the first question. And as to the 1.5,
16 that's a legal question that I'm going to have you all
17 brief and see if you can find something on that novel
18 approach. And I'll give you a week to do that. But as
19 to the second, since you've just submitted these things,
20 I want to look at where in his statement --

21 MR. COLLINS: Page three, paragraphs 12 and 13 is
22 what I see, Your Honor.

23 THE COURT: Mr. Smith, I don't see that statement
24 that clearly says that -- it's not an all-inclusive
25 statement, so I don't know that it meets the standard to

1 show that that asset is untainted.

2 MR. SMITH: Well, respectfully we agree that it
3 doesn't say that it's totally untainted, but I think that
4 meets our burden of production, and the Government then
5 has the burden to prove that it's not.

6 THE COURT: Let me hear from the Government on
7 this.

8 MR. COLLINS: Your Honor, we respectfully
9 disagree. I think a self-serving affidavit from a
10 criminal defendant that is vague with respect to the
11 dates in which he opened the account, on its face says
12 some of the money of which was purchased with margin
13 loans in and of itself fails to meet any burden to
14 suggest that this is some evidence. There needs to be
15 some credible evidence that these aren't tainted funds
16 and this self-serving affidavit with the admission that
17 only some of this money was used -- was purchased with
18 margin loans doesn't meet the standard.

19 THE COURT: Mr. Smith, do you have any other
20 evidence to present?

21 MR. SMITH: Well the account itself is styled in
22 this person's name, it's not styled in Madison Pain
23 Clinic, that supports what he's saying.

24 THE COURT: I don't see how that does, I mean --

25 MR. SMITH: Well, if it was Madison Pain Clinic

1 account, it would be styled as such.

2 THE COURT: The grand jury made a finding of
3 probable cause, so we're saying that if he's -- if the
4 Government proves he's committed the alleged acts,
5 doesn't mean he kept all the money in the name of the
6 company versus his personal account.

7 MR. SMITH: I understand that. I just believe
8 that our burden is much lighter and much less. And his
9 affidavit, although be it from the defendant, was
10 admitted into evidence and is certainly there to support
11 the allegation that this account is not all tainted
12 funds, and that triggers their obligation to prove
13 otherwise.

14 THE COURT: Any other evidence?

15 MR. SMITH: No, sir.

16 THE COURT: Okay. Well here's what I'm going to
17 do is -- go ahead and submit your brief in a week, I
18 don't know if that's sufficient on the second account to
19 force the Government to meet this other burden. I'll
20 give you the opportunity to explain to me why in the
21 brief you think that is. And can y'all have those briefs
22 a week from today?

23 MR. COLLINS: Yes, Your Honor.

24 THE COURT: Mr. Smith?

25 MR. SMITH: I think I can, yes, sir.

1 THE COURT: And I'll go ahead and decide the issue
2 as to the additional attorney prior to that. And of
3 course if we end up releasing funds and have another
4 hearing, then we can go ahead and you'll be relieved at
5 that point.

6 Anything further from defendant?

7 MR. SMITH: I just want to make sure we're clear.
8 The Government apparently is of the opinion they don't
9 have any obligation to produce evidence with respect to
10 the condominium under Melrose. Is that where we're
11 leaving this?

12 THE COURT: No, the Government --

13 MR. SMITH: I don't understand.

14 THE COURT: -- I don't know whether they are
15 citing any case law either for this proposition. They
16 are asserting that the gain -- you can't separate the
17 gain from the original asset.

18 MR. SMITH: So if in fact we can, then those funds
19 should be available.

20 THE COURT: Well then we'll address that.

21 MR. SMITH: Isn't that the full legal issue?

22 THE COURT: On that issue. I mean I think it
23 sounds like it's going to be a question of law whether or
24 not that can be separated. And if it can be separated, I
25 don't know that the Government is conceding that issue at

1 this point.

2 MR. SMITH: Then they need to bring forth their
3 evidence today if they are not conceding that --

4 THE COURT: Well, I want to make sure -- I'm going
5 to make a decision before we proceed based on that
6 footnote in the Fifth Circuit case.

7 MR. SMITH: Melrose is a civil case.

8 THE COURT: I understand.

9 MR. SMITH: And they were talking about using the
10 civil proceedings for criminal discovery. This is much
11 different here because we've got a defendant who has not
12 had his trial yet and has a Sixth Amendment right, which
13 is different from a civil case.

14 THE COURT: I understand, Mr. Smith, but I want to
15 see what y'all produce and research before we proceed any
16 further.

17 MR. SMITH: Be pleased to do so.

18 THE COURT: Anything further from the Government?

19 MR. COLLINS: No, Your Honor.

20 THE COURT: Okay. We'll be in recess.

21 (End of proceedings)

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1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above-entitled
3 matter.

4

5 /s/ Lori Barnett
6 Court Reporter

12/3/09
Date

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